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No. 91-453

In the
Supreme Court of the United States
October Term, 1991

DAVID H. LUCAS,
Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF OF DEFENDERS OF PROPERTY RIGHTS, AMERICAN SHEEP INDUSTRIES ASSOCIATION, INC., ENVIRONMENTAL CONSERVATION ORGANIZATION, LAND IMPROVEMENT CONTRACTORS ASSOCIATION, & OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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DEFENDERS OF PROPERTY RIGHTS

QUESTIONS PRESENTED

1. Whether a statute which deprives a property owner of all of the economic value of his land goes too far and thus will be recognized as a taking?

2. Whether the Government must bear the burden of proving a nuisance defense of a taking claim?

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CONSTITUTION:

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Pursuant to Rule 37.3 of the Rules of this Court, *Amici* in Support of Petitioner submit this brief *amici curiae*. The *amici* support reversal of the decision by the Supreme Court of the State of South Carolina.

INTEREST OF *AMICI CURIAE*

Defenders of Property Rights is a non-profit, public interest law foundation whose members are property owners, users and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws

of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest and the private property rights of its membership. Defenders of Property Rights engages in litigation around the country on behalf of its membership in defense of property interests protected against government incursion by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory taking issues.

American Sheep Industries Association, Inc. is an organization of 109,000 sheep producers including 47 state associations and 20 affiliated organizations. The Association is dedicated to the protection of the rights of property use and ownership as essential elements in the sheep production industry.

The Environmental conservation Organization is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality.

Land Improvement contractors Association is a 40-year old organization of building and construction contractors whose industry is dramatically impacted by zoning and land use regulations. The Association has been active at the national and local levels on behalf of its members in opposing unnecessary and excessively burdensome restrictions upon the use of private property.

The Outdoor Advertising Association of America, Inc. ("OAAA") is a national organization comprised of billboard and outdoor sign owners. Outdoor advertising is pervasively regulated through the zoning process and by other

mechanisms at the national, state and local levels. These regulations are often confiscatory. OAAA has been active for many years in the courts, Congress and in state legislatures in defense of the property rights of its members.

STATEMENT OF THE CASE

This case affords an opportunity to complete the unfinished business left open by the alternative tests set forth in *Agins v. City of Tiburon*, 447 U.S. 225 (1980),[1] where this Court stated:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.

Id. at 260. (Citations omitted).

While this Court made clear in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that the first half of this alternative test is satisfied if the governmental action does not substantially advance the stated government purpose, lower courts require an equally clear articulation that a taking will also be recognized where the owner has been deprived of the economically viable use of his land.

Despite the court's repeated statement of the alternative test, lower courts have been reluctant to find a taking solely on the basis of deprivation of economic viability. As a

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[1] Since *Agins* did not involve a total deprivation of all economic value, the issue was not before the Court at that time.

result, courts have tended to indulge in a "belt and suspenders" approach to taking analyses even when the diminution in value has been complete, analyzing at length other factors which would seem to be extraneous under the plain language of the second half of the alternative test of *Agins*.[2]

The South Carolina Supreme Court clearly did not believe that this Court meant what it said in *Agins*, and thus refused to find a taking despite the deprivation of all economic value. This case squarely poses an instance in which a regulation deprives the property of all economic value requiring that this Court ascertain the vitality of the rule which it enunciated in *Agins*.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution, as applied to South Carolina through the Fourteenth Amendment, demands that Petitioners receive just compensation for the taking of their property under the South Carolina Coastal Council's beach management regulatory scheme. By statutorily mandating setback lines which prohibit the construction of any permanent structure such as a house or other habitable dwelling, South Carolina has deprived Petitioner of 100 percent of the economically

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[2] *See, e.g., Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (1990), *appeal filed*, No. 91-5050 (Fed. Cir. argued Nov. 1991); *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 179 (1985) *reversed on other grounds*, 791 F.2d 893 (Fed. Cir. U.S. 1054 (1987), *on remand*, 21 Cl. Ct. 161 (1990); and *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991).

viable use of the property. A statute which results in the total deprivation of all the economic value of private property must be recognized as a taking in violation of the Fifth Amendment. Any holding short of that eviscerates the plain meaning of this constitutional guarantee.

Courts must look beyond broad legislative pronouncements determining whether a taking has occurred. To sustain a holding that a proposed use of property constitutes a nuisance (and therefore as a defense to a taking claim) there must be proof that actual public harm would be inflicted by that use. In this instance, the lower court relied only upon the legislative findings supporting the statute and, therefore, failed to ascertain whether Lucas' proposed use would indeed constitute a public nuisance.

I. A Statute Which Goes Too Far in Regulating Private Property Will be Recognized as a Taking

The United States Constitution limits the exercise of South Carolina's regulatory authority. The United States Constitution provides that private property shall not be "taken for public use, without just compensation." *U.S. CONST. amend. V.* The Taking Clause of the Constitution does not forbid the exercise of otherwise legitimate governmental authority. Instead, it places a condition upon the exercise of that authority, requiring that just compensation be paid when the governmental action amounts to a taking.

"This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but to secure *compensation* in the event of otherwise proper interference

amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987).

This constraint upon the exercise of governmental power is a guarantee "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).[3]

The right to just compensation does not depend upon the importance of the public policy underlying the regulation which results in a taking. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).[4]

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[3] *American Savings and Loan Association v. County of Marin*, 653 F.2d 364, 372 n.1 (9th Cir. 1981) ("Courts faced with particular challenges to zoning measures must nonetheless ask whether those measures exact such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering."); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988). (The Fifth Amendment's just compensation provision is designed to bar the government from foisting a disproportionate burden upon a particular group of individuals for a harm which is public and whose burden should be shared by the public as a whole.)

[4] In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court invalidated a building permit condition which would have allowed public access over the landowners' private (continued...)

Of course, not every exercise of regulatory authority constitutes a taking of private property. Whether a taking has occurred depends upon the extent to which the regulation impacts the owners' constitutionally protected property rights. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal* at 415.

A. A Statute Which Deprives Property of All Economic Value Goes Too Far and Will be Recognized as a Taking

The plain meaning of the Takings Clause is that the government may not deprive the owner of the entire value of his property while withholding compensation. This principle is fundamental to the condemnation process, which recognizes the government's right to take part or all of the owner's private property but ensures that he will receive just compensation for it. The same principle applies where the government has taken physical possession of the property,

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[4] (...continued)
beach, saying:

> The Commission may well be right that [public access to the beach] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the Nollan's property, it must pay for it. *Id.* at 841-42.

rendering it valueless to the owner. *United States v. Causby*, 328 U.S. 256, 261 (1945); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And a regulation "goes too far" when, like condemnation and physical possession, it empties the property of all value. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991).

A regulation which "goes too far" will be recognized as an unconstitutional taking. *Pennsylvania Coal v. Mahon*, *supra*. Certainly a regulation can go no farther than to eliminate the entire economic value from the property. Indeed, the market value of a parcel of property is a surrogate for the bundle of rights which is property ownership. When a property lacks economic value, the marketplace is affirming that the bundle of private property rights is empty or has been destroyed.[5]

The United States Supreme Court has repeatedly held that the deprivation of a fundamental property right constitutes a

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[5] Even nominal market value of property is an insufficient basis to preclude a finding of taking when all viable economic activity has been destroyed. "There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless. In fact, when courts have determined that property has been rendered unfit for economically viable activity, they have found a Fifth Amendment taking even though the property obviously continued to have market value." *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 167 (1985).

taking. Describing the incidents of property ownership as a "bundle of sticks," the Court has cautioned that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 44 U.S. 51, 66 (1979). However, a regulation which deprived an Indian of the "right to pass on property -- to one's family in particular -- [which] has been part of the Anglo-American legal system since feudal times" so impairs this bundle of rights as to constitute an invalid taking without just compensation. *Hodel v. Irving*, 481 U.S. 704, 717 (1987). Likewise, the assertion by the United States of a navigational easement over a formerly private waterway unconstitutionally deprived the owner of "one of the most essential sticks in the bundle of rights that are commonly characterized as property -- the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (deprivation of the right to exclude public from owner's private beach constitutes a taking).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court invalidated a city ordinance which required installation of a cable television receiver box on all apartment buildings in New York. Characterizing the installation of the box as a physical invasion, the Court found that this invasion "chops through the bundle taking a slice of every strand." *Id.* at 437. "[T]he permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessary use of the property. Although deprecation of the right to use and obtain a profit from property is not, in ever case, independently sufficient to establish a taking (citations omitted), it is clearly relevant." *Id.*

In *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991), a statute prohibiting the mining of a coal deposit was recognized as a taking of the entire economic value of the coal:

> This case presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminution in value of the property at issue that the court has found. Logically, when a diminution in value is absolute, a taking is more easily found. . . . In the case at hand, the diminution in property value is total, and there is no public interest in causing plaintiffs to solely bear the burden of maintain[ing] the AVF [alluvial valley floor] protected by SMCRA.

Id. at 406.

Finally, in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), a denial of a permit to fill the plaintiff's property was recognized as a taking because it took virtually the entire value of the land:

> The location of the lot makes it improbable that a single home would be built on, it is more likely than not that this acre will remain an empty lot, and therefore although it was not included in the permit application, the denial of the permit effectively renders this acre without economically viable use, as well as the 11.5 acres of wetlands."

Id. at 159. *See also Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 179 (1985) ("[W]hen government treats

private land as if it were its own, ignoring the interest of the property owner and rendering the property economically useless, it has worked a taking and, under our Constitution, compensation is due.").

B. Lucas Has Been Deprived of All the Economic Value of The Property

In 1986 when David Lucas bought the two undeveloped oceanfront lots in the Wild Dunes Development on the Isle of Palms in Charleston County, South Carolina, Mr. Lucas had every intention of building on the lots -- a home for himself and another for sale -- and at that time, there was no legal impediment to the single-family residential development by the state, county or municipality. *Tr. Ct. at 1-2.* Mr. Lucas paid $475,000 for one lot and $500,000 for the other. *Tr. Ct. at 1.*

As a result of the passage of the Coastal Zone Management Act of 1988, with its attendant setback lines along the entire coast, Mr. Lucas' lots will now remain "forever undeveloped." *Tr. Ct. at 2.* The trial court found that, as a result of these building restrictions, Mr. Lucas is deprived

> of any reasonable economic use of the lots, [which] has eliminated the unrestricted right of use, and renders them valueless. *Tr. Ct. at 5.*

Thus, Mr. Lucas has, like the property owner in *Loveladies Harbor*, been simply left with empty lots which are destined to remain so. There is no question that Lucas has lost his investment and is left with property totally devoid of value. There is no question that this statute has gone too far, and

indeed, could go no farther than taking all economic value of Mr. Lucas' property. Therefore,

> the interference with [Lucas'] property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 136 (1978) *quoting Pennsylvania Coal*, 260 U.S. at 413.

The legitimacy of the exercise of the police power is not at issue here. It is only legitimate exercises of police power which implicate the Fifth Amendment. *Nollan v. California Coastal Commission*, 483 U.S. 825, 841-42 (1987).

II. The Government Bears the Burden of Proving a Nuisance Defense to a Takings Claim

The South Carolina Supreme Court was correct when it stated that one may not use one's property so as to damage others. Conceptualizing this a little differently, the use of one's property so as to harm others is not a legitimate property right and, therefore, cannot be taken. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, n.20 (1987). However, the South Carolina Supreme Court's reliance upon *Mugler v. Kansas*, 123 U.S. 623 (1887) and other cases in which this Court has found the nuisance exception applicable, is misplaced. In *Mugler*, this Court established the "noxious use" doctrine as a narrow exception to the Fifth Amendment taking clause mandate for those instances where the proposed use of property involves quite profound and immediate adverse physical effects upon the health, safety or welfare of others. *E.g., Keystone Bituminous Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987) (subsidence threatening buildings and ground water) and

Miller v. Schoene, 276 U.S. 272 (1928) (state action to destroy certain trees carrying infectious disease hazardous to principal agricultural crop in Virginia).

But the validity of a nuisance defense cannot be determined by legislative pronouncements alone.[2] The mere passage of a statute outlawing certain activity does not determine whether a nuisance exists at the particular property.[3] First, government cannot be allowed to define property rights out of existence simply by calling otherwise legitimate uses of property a nuisance. *Cf., Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

> It does not rest with the public, taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that

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[2] *Cf Loveladies Harbor, Inc. v. United States*, 15 C. Ct. 375, 388 (1988), where Court stated that "the mere fact that the governmental regulation was intended to promote a public benefit is not sufficient to [determine whether the regulation substantially advances a public purpose.] This determination must also involve the Court's weighing of that intended public benefit against the harm inflicted upon the landowner involved." *Quoting Agins v. City of Tiburon*, 447 U.S. at 261.

[3] This is not to say that the legislature cannot decree that certain activities injurious to public health and safety (*e.g.*, maintaining a facility for producing illegal drugs) constitute a *per se* nuisance. However, the Court must ascertain whether the activity actually falls within the common law notion of "nuisance," and may not simply accept the proposition that a formerly lawful activity is a "nuisance" merely because the legislature says it is.

> just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327. Otherwise, the existence of particular property rights would be dependent upon legislative grace rather than being constitutionally protected against public seizure without just compensation. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991) (Enactment of SMCRA which deprived owner of all value of property is a taking); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) ("[L]egislature cannot simply alter these long-established property rights to accommodate new recreational needs.").

Second, the legislative branch is institutionally incapable of performing the judicial function of weighing the evidence necessary to determine whether the proposed use of the particular parcel of property will constitute a nuisance.[8] Whether a particular proposed use would constitute a threat of injury to others (*i.e.*, a nuisance) cannot be resolved in the present case by a general proposition that all coastline development is deleterious. Such coastline development has traditionally been permitted and even encouraged in South Carolina and elsewhere in our nation; hence, it has not traditionally been characterized as a nuisance. Thus, this landowner is entitled to notice and a judicial hearing to ascertain whether, on the facts of his particular case, the outlawed activity is a constitutionally-protected fundamental property right or (as contended here) an unprotected nuisance.

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[8] *But see* n.7 *supra* to statutes defining *per se* nuisances.

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1977), *citing United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). Moreover, if the legislature could take private property without notice and hearing, then serious due process concerns are implicated. As indicated by the court in *Florida Rock*, 8 Cl. Ct. at 171:

> [S]imple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the Fifth Amendment. "[M]ere labels" of this sort afford "no talismanic immunity from Constitutional limitations." (citations omitted) Government may not circumvent the takings clause by defining activity as noxious by fiat. . . . To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes harm.

Thus, the court, and not the legislature, is the appropriate forum in which to determine whether a nuisance exists. The government bears the burden of proving such a nuisance defense. *Cf., Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. at 154-58. The South Carolina Coastal Council failed to sustain this burden, choosing to rely instead on the legislative findings supporting the statute. Since those legislative findings, standing alone, do not constitute sufficient evidence to sustain the burden of proving the existence of a nuisance on the facts *of this particular case*,

the opinion of the South Carolina Supreme Court must be reversed.

CONCLUSION

Petitioner has proved a taking by demonstrating that he has been deprived of all of the economic value of his property. Respondent has failed to prove the existence of a nuisance defense.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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December 31, 1991 DEFENDERS OF PROPERTY RIGHTS